

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

January 28, 2008 Session

DOUGLAS TOALSTON v. BRIDGESTONE/FIRESTONE, INC.

**Direct Appeal from the Circuit Court for Rutherford County
No. 54531 J. Mark Rogers, Judge**

**No. M2007-01212-WC-R3-WC - Mailed - March 19, 2008
Filed - April 24, 2008**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The Employee developed lateral epicondylitis as a result of his work activities, and the Employer provided medical treatment for the injury. The Employee's symptoms were not relieved, and he sought and received a second opinion through his Employer. Both authorized physicians concluded that the Employee had no permanent impairment. The Employee sought an evaluation from an unauthorized physician, who diagnosed carpal tunnel syndrome in addition to lateral epicondylitis. That physician performed surgery and assigned permanent impairment. The Employee sought permanent disability benefits, and the Employer denied liability. The trial court awarded 30% permanent partial disability to the right arm. The Employer has appealed arguing that the evidence preponderates against the trial court's findings. We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of
the Circuit Court Affirmed**

JERRY SCOTT, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

Terry L. Hill and Lauren S. Disspayne, Nashville, Tennessee, for the appellant, Bridgestone/Firestone, Inc.

Herbert M. Schaltegger and D. Russell Thomas, Murfreesboro, Tennessee, for the

appellee, Douglas Toalston.

OPINION

Factual and Procedural Background

Douglas Toalston began working for Bridgestone/Firestone, Inc. (“Bridgestone”), a tire manufacturer, in April 2003. He filled in for other employees who were on vacation or absent from work for other reasons. On June 8, 2005, he was building a truck tire on a tire-building machine. The materials used to assemble the tire were sticking or jamming. In order to clear the machine, it was necessary for him to pull the material with his arms outstretched. While pulling the material in this manner, his right arm became unusually fatigued. He reported his symptoms to his supervisor and was taken to Bridgestone’s internal medical facility, where he was treated with an ice pack. After receiving treatment, Mr. Toalston returned to work at a reduced pace.

At some point thereafter, Mr. Toalston selected Dr. Tony Adams from a panel of physicians offered in accordance with Tennessee Code Annotated section 50-6-204(a)(4). Mr. Toalston then requested and was provided with a second panel, from which he selected Dr. Jeffrey Hazelwood, a physiatrist. Dr. Hazelwood testified by deposition. He first saw Mr. Toalston on August 10, 2005. His diagnosis was medial epicondylitis. He provided conservative treatment to Mr. Toalston, including physical therapy, splinting, a cortisone injection and light duty. Mr. Toalston improved somewhat but remained symptomatic. An MRI of the elbow was performed in September 2005. The MRI study revealed tendinitis on the lateral aspect of the elbow but was normal on the medial side, which is where Mr. Toalston’s symptoms were located. Dr. Hazelwood released Mr. Toalston from his care on September 16, 2005, with no permanent restrictions and no finding of impairment.

Mr. Toalston requested and received another opinion. He was provided with a third panel of physicians for this purpose, from which he selected Dr. Douglas Pierce. Dr. Pierce did not testify, but his notes were placed in the record as exhibits to Dr. Hazelwood’s deposition. His conclusions were consistent with those of Dr. Hazelwood.

Mr. Toalston was then referred by his attorney to Dr. Richard Fishbein, an

orthopaedic surgeon, who examined him on November 1, 2005. Dr. Fishbein testified by deposition. Consistent with the other physicians, he concluded that Mr. Toalston had medial epicondylitis. He also administered a form of EMG testing, using a hand-held device. That test indicated that Mr. Toalston had “severe” carpal tunnel syndrome in his right arm. At no time prior to that test had Mr. Toalston advised any doctor of symptoms that resembled carpal tunnel syndrome. Dr. Fishbein recommended surgery to correct both conditions.

Through counsel, Mr. Toalston requested that Bridgestone authorize Dr. Fishbein to perform the procedures that he had recommended. Bridgestone declined but advised Mr. Toalston’s counsel that Mr. Toalston was authorized to return to either Dr. Hazelwood or Dr. Pierce for additional treatment or testing. Mr. Toalston also sought to have the Department of Labor and Workforce Development order Bridgestone to provide the treatment. That application was denied on April 11, 2006.

Mr. Toalston then arranged for surgery by Dr. Fishbein through his health insurance carrier. The surgery was performed on May 3, 2006, and consisted of an ulnar nerve transposition and carpal tunnel release. According to his records, Dr. Fishbein released Mr. Toalston to return to work on July 12, 2006, and he continued to follow his patient until August 22, 2006. He imposed permanent restrictions upon Mr. Toalston’s activities as follows: “[N]o repetitive gripping more than 10 to 15 minutes an hour; can occasionally lift 20 to 30 [pounds], maximum 40 to 50. He needs to avoid vibrating instruments or repetitive extension of his elbow with weights greater than 10 pounds . . . 10 to 15 times per minute.” Dr. Fishbein testified that Mr. Toalston retained a 2% impairment to the right arm as a result of the elbow injury and 4% to the right arm as a result of carpal tunnel syndrome. He opined that the elbow injury and carpal tunnel syndrome were caused by Mr. Toalston’s repetitive work for Bridgestone. He agreed that there was no record of symptoms of carpal tunnel syndrome in any of Mr. Toalston’s medical records prior to November 1, 2005.

Dr. Hazelwood testified that the EMG device used by Dr. Fishbein was an unreliable “gadget” which was not generally accepted among physicians who routinely administer EMG testing. He therefore disagreed with the diagnosis of carpal tunnel syndrome based upon the results of the test administered by Dr. Fishbein, and he also testified that he disagreed with Dr. Fishbein’s recommendation for surgery.

On the day of trial, Mr. Toalston was fifty years old. He had attended Ohio State University for four semesters. He had also earned thirty-nine hours of community college credit while serving in the Air Force. His areas of study included horse management, food service management and hotel management. He had also been trained and licensed to administer audiometric testing. His work history included race horse trainer, inventory manager, sheet metal mechanic, assistant manager of restaurant, and assistant manager of a shoe store. In addition, he had taught private guitar lessons and was a songwriter. He continued to work for Bridgestone until he had surgery in May 2006. At the time of trial, he had not returned to work for Bridgestone, although he was still considered to be an employee. He had not worked anywhere else since May 2006.

The trial court held that Mr. Toalston's right elbow injury and carpal tunnel syndrome were compensable and that he had given sufficient notice of his carpal tunnel syndrome. The court awarded permanent partial disability ("PPD") benefits of 20% to the right arm and 10 weeks of temporary total disability ("TTD") benefits. The court declined to order Bridgestone to pay for the treatment rendered by Dr. Fishbein. Judgment was entered accordingly, and Bridgestone has appealed from that judgment.

Issues Presented

Bridgestone has raised five issues on appeal:

(1) Did the trial court err by finding that Mr. Toalston had sustained a permanent disability as a result of a right elbow injury?

(2) Did the trial court err by finding that Mr. Toalston developed carpal tunnel syndrome in his right arm as a result of his employment?

(3) Did the trial court err in awarding ten weeks of TTD?

(4) Did the trial court err in finding that Mr. Toalston had provided timely notice of his alleged carpal tunnel injury?

(5) Is the award (20% PPD to the right arm) excessive?

Standard of Review

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987). A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

1. Permanency of Elbow Injury

Bridgestone does not contest the compensability of Mr. Toalston's right elbow injury. However, it contends that the trial court erred in finding that the injury caused a permanent disability. Bridgestone's argument is based upon several factors: Dr. Hazelwood's conclusion that there was no permanent impairment; the absence of objective findings by Dr. Hazelwood and the other treating physicians; and the results of the September 2005 MRI. Bridgestone also asserts that Dr. Fishbein's testimony was not credible because he did not see Mr. Toalston until five months after the alleged injury and because of his use of an allegedly unreliable in-office test as the basis for many of his conclusions.

Mr. Toalston notes that both doctors agreed that he had an elbow injury. He contends that Dr. Fishbein's opinion is more credible because he is an orthopaedic surgeon, rather than a physiatrist. He also points out that his symptoms did not improve as a result of the conservative treatment rendered by Dr. Hazelwood, but did improve somewhat after Dr. Fishbein performed surgery.

The existence of a causal relationship between the employment and the injury

must be established by the preponderance of the expert opinions supplemented by the lay evidence. The proof of the causal connection may not be speculative, conjectural, or uncertain. Clark v. Nashville Mach. Elevator Co., 129 S.W.3d 42, 47 (Tenn. 2004); Simpson v. H.D. Lee Co., 793 S.W.2d 929, 931 (Tenn. 1990); Tindall v. Waring Park Ass'n, 725 S.W.2d 935, 937 (Tenn. 1987). Absolute certainty with respect to causation is not required, however, and the Court must recognize that, in many cases, expert opinions in this area contain an element of uncertainty and speculation. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678 (Tenn. 2005). All reasonable doubts as to the causation of an injury and whether the injury arose out of the employment should be resolved in favor of the employee. Phillips v. A&H Constr. Co., 134 S.W.3d 145, 150 (Tenn. 2004).

Mr. Toalston sustained a work-related injury. His symptoms were documented by all physicians who examined him. Those symptoms improved somewhat after surgery, but did not completely disappear. Permanent restrictions were placed upon his activities as a result. Based upon these factors, we find that the evidence does not preponderate against the trial court's finding on this issue.

2. Causation of Carpal Tunnel Syndrome

Bridgestone contends that the trial court erred in finding that Mr. Toalston developed carpal tunnel syndrome as a result of his work. In support of its argument on this point, Bridgestone points to the medical records of all physicians who examined Mr. Toalston prior to Dr. Fishbein. Those records contain no reference to symptoms associated with carpal tunnel syndrome. Dr. Hazelwood testified that he performed a Tinel's test as part of his initial examination of Mr. Toalston, which was negative. Moreover, Mr. Toalston wrote a one and one-half page letter to Bridgestone's medical department in August 2005, which refers only to elbow symptoms and does not mention symptoms of carpal tunnel syndrome. In addition, Bridgestone's position is supported by the testimony of Dr. Hazelwood that the testing device used by Dr. Fishbein is not reliable.

Mr. Toalston responds by noting that he had a positive Phalen's test when he was examined by Dr. Fishbein. He also notes, as before, that Dr. Hazelwood is not a surgeon. Finally, he points out that Dr. Fishbein defended the accuracy and usefulness of the device with which he performed the EMG test.

The evidence concerning this issue is more evenly balanced than that concerning the elbow injury. The trial court could have reasonably concluded either that Mr. Toalston did not actually have carpal tunnel syndrome, or that the condition was not related to his work. However, we cannot find that the evidence preponderates against the trial court's ultimate conclusion that Mr. Toalston developed carpal tunnel syndrome which was caused by his work at Bridgestone. We therefore affirm that portion of the judgment.

3. Temporary Total Disability

The trial court awarded ten weeks of temporary disability benefits. Neither Dr. Fishbein, nor any other doctor, testified on the subject of temporary disability. The trial court reviewed Dr. Fishbein's records, which were attached as an exhibit to his deposition. Those records clearly show that Dr. Fishbein took Mr. Toalston off work from the date of his surgery in May 2006 until July 12, 2006, a period of ten weeks. Bridgestone suggests that the trial court erred by considering this information in the doctor's records, but does not offer any authority in support of that proposition. The records were an exhibit to Dr. Fishbein's deposition and the trial judge was entitled to read all of the exhibits. If the trial judge could not examine the exhibits, there was no reason to introduce them. Hence, that is a spurious argument. Finally, Bridgestone contends that an award of temporary disability should not be based upon Dr. Fishbein's opinion because he was not an authorized physician. There is no basis for the exclusion of testimony from a physician who performed surgery and related what he observed to the trier of fact. There is clearly no merit in either argument.

4. Notice

Bridgestone contends that the carpal tunnel syndrome claim should be barred for failure to give notice of the injury as required by statute. The trial court made alternative holdings on the issue. First, it found that the description of the injury contained in Bridgestone's First Report of Injury was sufficient to satisfy the notice requirement. That document was completed by Mr. Toalston on the date of his injury. In the area of the form labeled "Body Part Affected," he wrote "R elbow." In the area of the form, which requests a description of the accident, he wrote "After clearing 2 ply jam up notice pin (sic) in R elbow. Pain worsened while building until grasping items with R. hand is painful." This interpretation of the report is strained. The trial court found that the accident description referred to pain in the right hand. However,

that is not clear from the evidence, including the other portion of the document, and Mr. Toalston's subsequent descriptions of his symptoms to various physicians, including Dr. Fishbein, do not support that interpretation.

The trial court also found that Mr. Toalston had given timely notice of the condition at the time he became aware of it, which was when Dr. Fishbein made his diagnosis. This is supported by the evidence, and consistent with case law which provides that the time period for giving notice commences when the employee becomes aware of the existence of the injury. Banks v. United Parcel Serv., Inc., 170 S.W.3d 556, 562-63 (Tenn. 2005).

5. Extent of Disability

The trial court accepted Dr. Fishbein's opinion that Mr. Toalston retained a 6% impairment of his right arm. The award was not subject to the 1.5 times impairment "cap" contained in Tennessee Code Annotated section 50-6-241(d)(1)(a) because Mr. Toalston had not returned to work, and Bridgestone conceded as much at trial. The award of 20% PPD is slightly more than three times the impairment rating. Mr. Toalston is well-educated and has a broad range of experience. However, he sustained impairment and permanent restrictions as a result of the injuries. Hence, the award is not excessive.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the appellant, Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

JERRY SCOTT, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JANUARY 28, 2008 SESSION

DOUGLAS TOALSTON v. BRIDGESTONE/FIRESTONE, INC.

Circuit Court for Rutherford County
No. 54531

No. M2007-01212-WC-R3-WC - Filed - April 24, 2008

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellant, Bridgestone/Firestone, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM